

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL WISELEY)	
Claimant)	
VS.)	
)	Docket Nos. 195,924, 195,925
UNITED PARCEL SERVICE)	& 195,926
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals the Award of Administrative Law Judge Robert H. Foerschler dated June 27, 1997. Oral argument was heard on July 21, 1998, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, James M. Sheeley of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey S. Austin of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

Record

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

Stipulations

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. There is a correction in that the temporary total disability compensation paid for 2.67 weeks is for the injury of November 3, 1993, rather than the injury of October 8, 1993. The parties acknowledge the Stipulation filed January 22, 1998, wherein respondent and the fund agreed they received a copy of claimant's application for review in July 1997. The timeliness of this appeal is not an issue in this matter.

ISSUES

- (1) What is the nature and extent of claimant's injury and or disability?
- (2) Is claimant entitled to unauthorized medical in this matter?
- (3) Are the Wiseley depositions, taken November 6, 1996, included in the record as they were taken beyond claimant's terminal dates?

This matter was originally filed as three separate injuries with three separate docket numbers. The Award consolidates all three cases, with only one final Award. There was no objection by any of the parties to this consolidation by the Administrative Law Judge. The Appeals Board considers this to be an acquiescence on the part of the parties and the case consolidation will remain.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant began working for United Parcel Service (UPS) as a delivery driver in October 1985. This constituted part-time work, with claimant beginning full-time work in May 1993. Claimant suffered a series of accidents to his left foot and ankle with allegations of injury and aggravation to his low back. The first accident (Docket # 195,924) occurred on October 8, 1993, at which time claimant was treated by Dr. Brown, provided physical therapy and missed no work. The second injury (Docket # 195,925) occurred on November 3, 1993. Both the first and second injuries were to claimant's left foot and ankle with no aggravation alleged to his low back. Claimant was paid 2.67 weeks temporary total disability compensation for the November 1993 accident and then returned to his regular job at UPS.

Claimant then suffered a third injury (Docket # 195,926), again to his left foot and ankle, on December 22, 1993. Sometime after this accident, claimant alleges his low back began bothering him as a result of the problems associated with the left foot and ankle. Claimant was treated by several doctors including Dr. Brown, Dr. Berl, Dr. Phillips, and ultimately was referred to Dr. Timothy M. Badwey. Dr. Badwey, a board certified orthopedic surgeon, examined and treated claimant for the injuries to his left foot for several months. He diagnosed a longitudinal tear of the plantar fascia. He recommended claimant be cast and immobilized for a period of time, but recommended no additional treatment for the foot. Dr. Badwey's records are void of any mention of claimant's low back problems or symptoms.

By March 1994, claimant was released with light duty limited restrictions which prohibited him from standing more than 20 percent of the time and prohibited lifting. Claimant received additional physical therapy and underwent work hardening and a functional capacity evaluation in May and June of 1994. Dr. Badwey assessed claimant a 12 to 13 percent impairment to the lower extremity, which he converted to a 5 percent body as a whole impairment. This was pursuant to the AMA Guides, Third Edition (Revised). Dr. Badwey was advised, during his deposition, that claimant had alleged he complained to Dr. Badwey numerous times of low back pain. However, Dr. Badwey testified that, if low back symptoms had been mentioned to him, they would have been placed in his medical records. Even if he did not provide treatment to claimant for the low back, he would have noted the complaints.

Dr. Badwey did review the FCE records from The Rehabilitation Center. The findings in the FCE he considered to be normal with regard to the back. There was no indication in the FCE report or in the reports of Dr. Phillips of any complaints by claimant to the low back. The only complaints were with regard to claimant's left foot and ankle.

Claimant was examined, at his attorney's request, by Dr. P. Brent Koprivica. Dr. Koprivica saw claimant on January 27, 1995. He was provided a history of claimant's three injuries and the restrictions from Dr. Badwey. He was also aware that claimant had undergone physical therapy at The Rehabilitation Center. Dr. Koprivica's examination uncovered the chronic left foot problems, including the problems with the arch of claimant's foot and the tear in the plantar fascia. He also diagnosed chronic soft tissue low back pain, attributable to the altered gait resulting from the foot difficulties. Dr. Koprivica's examination uncovered a limitation in claimant's range of motion, but there were no neurological problems diagnosed. He did x-ray the back but found no bony abnormalities in the lumbar spine. He assessed claimant an 18 percent whole body functional impairment for both the back and the left lower extremity of which 11 percent comprised the low back impairment. He did not assess claimant any neurological impairment in the low back as he felt there were no nerve involvements associated with this injury.

Dr. Koprivica was asked about the claimant's ability to perform the tasks he had performed over the 15 years preceding the accident. He discussed four jobs associated with the claimant's employment at UPS, including loader, unloader, sorter and package service deliverer. He did not break these jobs down into individual tasks. He opined claimant could not perform any of the jobs discussed with the exception of those requiring that he only sit. He would also be precluded from sitting as a UPS truck driver because he was obligated to drive a vehicle with a clutch, and this was beyond his abilities.

Claimant was referred to Dr. David J. Clymer, a board certified orthopedic surgeon, for an independent medical examination by the Administrative Law Judge. Dr. Clymer was provided with the medical records of Dr. Badwey and Dr. Koprivica, and also was provided the x-ray reports from the various examining and treating physicians. He found good range of motion in claimant's foot, ankle, left lower extremity and the low back. Dr. Clymer found no evidence in the medical records or in his examination of any injury or permanent impairment involving either the low back or the left knee. He did opine that he felt that an impairment rating in the range of 3 to 5 percent to the body as a whole would be appropriate for claimant's foot and ankle symptomatology.

Conclusions of Law

In workers compensation litigation, it is the burden of the claimant to show his entitlement to an award of benefits by proving the various conditions upon which an award may be granted. See K.S.A. 44-501 and K.S.A. 44-508(g). This burden must be satisfied by a preponderance of the credible evidence. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this matter, there is significant dispute regarding claimant's allegations of complaints to his low back. Claimant alleges, on many occasions, he discussed his low back symptoms with Dr. Badwey. However, Dr. Badwey disputes this, finding no mention of the low back in his records. Claimant's father, Ronald Wiseley, apparently attended one of the sessions with Dr. Badwey and alleges that he also brought up the low back complaints to Dr. Badwey. However, again, there is no mention of the low back in any of Dr. Badwey's medical records. In addition, the physical therapy notes and the functional capacity evaluation records make no mention of the claimant's low back.

Claimant was referred to Dr. Clymer for an independent medical examination by the Administrative Law Judge. Dr. Clymer's examination included the foot, ankle, knee, and the low back. He found no limitations in claimant's low back or knee, with the only functional impairment opined by Dr. Clymer limited to the left foot and ankle. The only medical report which contains any mention of the low back is that of Dr. Koprivica. Dr. Koprivica's examination, which occurred in January 1995, falls between the treating period by Dr. Badwey and the IME examination by Dr. Clymer in November 1995. Dr. Koprivica did find limitation in range of motion to claimant, but acknowledged there was no

neurological impairment in claimant's low back. Dr. Koprivica also acknowledged that the x-rays taken of claimant's low back indicated no bony abnormalities and no degenerative disc disease. Dr. Koprivica also used the AMA Guides, Third Edition (Revised), in assessing his functional impairment to claimant. Dr. Koprivica, in his January 1995 report, discusses various other functional impairments based upon the AMA Guides, Fourth Edition, and based upon certain Missouri statutes. These will not be considered for purposes of this Award.

In reviewing the evidence, the Appeals Board finds that the testimony of Dr. Badwey and Dr. Clymer provided the more credible medical opinions. The lack of complaint by claimant regarding his low back in the medical records of Dr. Badwey, in the physical therapy records and in the functional capacity evaluation, are persuasive that claimant did not have low back problems as a result of this injury. In addition, the examination of Dr. Clymer, taken in November 1995, failed to uncover any objective evidence of a back problem. The Appeals Board, therefore, finds that the Award of the Administrative Law Judge granting claimant a 20 percent loss of use of the left lower extremity is appropriate. The Appeals Board does note, however, that the injury is limited to claimant's foot and ankle which, pursuant to K.S.A. 44-510d, would limit claimant to 190 weeks. The Award by the Administrative Law Judge was computed based upon 200 weeks which involves the entire leg. This computation error will be corrected in the Award.

In regard to claimant's request for unauthorized medical treatment, the Appeals Board finds the evaluation by Dr. Koprivica was for the purpose of obtaining a functional impairment rating. As K.S.A. 44-510 precludes the use of unauthorized medical for the purpose of obtaining functional impairments, no unauthorized medical will be awarded.

With regard to the consideration of the depositions of claimant and Mr. Ronald Wiseley taken on November 6, 1996, the Appeals Board finds that the terminal dates for the parties had expired prior to that date. While the Workers Compensation Act is liberal in its allowance of evidence into the record, evidence taken beyond a party's terminal date, absent some request for some extension of time, which was not done in this case, is not allowed. The Appeals Board finds that the depositions of claimant and Mr. Ronald Wiseley taken on November 6, 1996, should be excluded and have not been considered for the purposes of this Award as part of the record. However, the Appeals Board also finds that, had the depositions of claimant and Mr. Wiseley been considered, there would have been no difference in the decision of the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is hereby granted in accordance with the above findings in favor of the claimant, Michael Wiseley, and against the respondent, United Parcel Service, and its insurance

company, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury sustained in the above dockets.

Claimant is entitled to 43.67 weeks of temporary total disability compensation at the rate of \$313 per week in the amount of \$13,668.71, followed by 29.27 weeks permanent partial disability compensation at the rate of \$313 per week in the amount of \$9,161.51 for a 20 percent loss of use of the left lower extremity, making a total award of \$22,830.22. As of the time of this Award, the entire amount would be due and owing, minus amounts previously paid.

As further stipulation of the parties, the Kansas Workers Compensation Fund shall reimburse respondent for 80 percent of the entirety of this Award.

The costs of the transcripts in the record are hereby taxed against the respondent, its insurance carrier and the Kansas Workers Compensation Fund, to be paid as follows:

Richard Kupper & Associates	\$2,229.20
Hostetler & Associates, Inc.	\$ 354.50

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Sheeley, Kansas City, KS
Frederick J. Greenbaum, Kansas City, KS
Jeffrey S. Austin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director